



STATE OF INDIANA

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March 2, 2012

Steven M. Badger
Attorney for Risk Metrics Corporation
111 Monument Circle, Suite 2700
Indianapolis, Indiana 46204

Re: Formal Complaint 12-FC-37; Alleged Violation of the Access to Public Records Act by the Indiana Worker's Compensation Board

Dear Mr. Badger:

This advisory opinion is in response to your formal complaint alleging the Indiana Worker's Compensation Board ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Linda Hamilton, Chairman, responded on behalf of the Board. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that for over a decade, Risk Metrics Corporation, d/b/a/ DataLister ("DataLister"), has had access to the Proof of Coverage data ("POC data") routinely collected by the Board. In July 2011, the Board denied your request for the POC data. You allege that the Board stopped providing the information on the same grounds that a prior opinion of this Office had already rejected. *See Opinion of the Public Access Counselor 99-FC-10.* On January 17, 2012, a written request for the POC data was submitted to the Board, to which the Board failed to respond despite subsequent communications with the Board's staff.

Indiana law requires that all Indiana employers report their worker's compensation coverage to the Board. The Board is charged by statute with collection of basic information about employers' worker's compensation coverage, including dates of expiration and notices of cancellation. *See* I.C. § 22-3-5-1, 2. Indiana contracts with the National Council on Compensation Insurance ("NCCI") to collect and provide the POC data. NCCI collects the data on a multi-state basis from insurers and provides it electronically to the states. NCCI and DataLister compete in offering technology for the effective use of, and access to, the same information.

DataLister first sought access to the Board's POC data in 1999. The Board denied the request pursuant to I.C. § 5-14-3-4(a)(4), claiming that the POC data was confidential and a trade secret. In Opinion 99-FC-10, Counselor O'Connor held that the expiration dates of contracts of worker's compensation insurance were not considered "trade secrets" citing the Indiana Court of Appeal's ruling in *Harvest Life Insurance v. Getche*, 701 N.E.2d 871, 876 (Ind. Ct. App. 1998). In response to Counselor O'Connor opinion, the Board provided the POC data, minus a few exceptions that the parties were eventually able to work out.

Rob Howell, the Board's Manager of Information Technology, informed DataLister in July of 2011 that it would no longer allow access to the POC data. Howell explained that any repackaging and reselling of the POC data is strictly forbidden and that the daily POC files are intended for the Board's use only. The Board thereafter provided that it had never provided DataLister with POC data, which you allege, is contrary to the documented history.

You provide that there have been no material changes in the APRA since the 1999 Opinion of the Public Access Counselor's Office that would alter the Board's responsibility to provide the POC data. *Getche* has never been overturned and has been cited by state and federal courts in recent years. As such, the Board should continue to provide access to the POC data to all those who request it.

In response to your formal complaint, Ms. Hamilton provided that the Board denied your request for records because it did not have any records that were responsive to it. The Board does not receive the POC data from a third party or independently create the records you sought. The Board houses no policy data in its databases and NCCI no longer provides the requested information to the Board.

In 2003, the Board hired a new IT manager who had no knowledge of the genesis of the relationship with DataLister. Thereafter, the new IT manager discussed with a DataLister employee the existence of the records that were sought. DataLister volunteered to pick up the daily files and build the Board what essentially can be described as a backup to the NCCI system. Given the long-standing history of providing the data to DataLister, this arrangement was agreed upon and in effect for nearly two years.

In October 2010, NCCI stated that the level of information access given to DataLister by the Board was inappropriate. NCCI wanted to take steps to prevent the transmission of its data to DataLister for free. The decision by NCCI was made to immediately suspend the transmission of information to the Board. Since October 2010 the Board has not been provided with the data now sought by DataLister.

I.C. § 22-3-5-2 provides the Board with a means of obtaining the information pertaining to insurance policy data. However, this provision neither defines the elements necessary to be reported nor the manner in which the Board will utilize the data. The Act simply speaks to reporting notices of termination, renewal, and additions of worker's

compensation policies. Further, the Act allows the Board to prescribe the manner in which said notices are to be provided. In this case, the Board has chosen to subscribe to the data feed currently provided to the Indiana Compensation Rating Bureau (“ICRB”) by order of the Indiana Department of Insurance (“IDOI”), and housed by their data warehousing vendor, NCCI.

The Board utilizes NCCI’s website as its exclusive means of determining the appropriate insurance carrier for a given claim. In early 2011, NCCI launched a web portal which was embedded into the Board’s website. This tool allows the same level of access, which was previously only available to Board employees, to the general public. The tool is free of charge and has been used by interested parties within the community to determine whether a particular employer has workers’ compensation insurance coverage. DataLister may ascertain this same information access by the Board and the public via the Board’s website.

The Board has not received further data than is available via this tool since October 2010. The Board has no need for greater access and has no plans to resume the Edi feeds. It is for these reasons why your request was denied and the Board invites you to utilize the same tool in place for use by its own employees.

In reply to the Board’s response, DataLister reiterated the allegations provided in the original formal complaint. DataLister continues to maintain that the POC data is public record and subject to disclosure. DataLister provides that the focus should remain on whether a public agency can evade its obligations under the APRA by storing or maintaining documents and information with a third-party vendor. The POC data is collected and provided pursuant to Indiana law. I.C. §§ 22-3-5-2, 2.5; I.C. § 22-3-5-5(c)(5). Employers have a legal responsibility to ensure their coverage information is provided to the Board. If the Board does not have access to the POC data, then it has abdicated its statutory responsibility to receive such information. The nature of a public record does not change because the POC data is maintained on the Board’s computers or on the hardware provided by NCCI.

DataLister cites to *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) (“Knightstown”) for the holding that an attorney for a public entity “created, maintained, and retained custody” of a document on behalf of the Town did not excuse that public authority from providing access to the record under the APRA. The same result should follow here, in that the Board can not preclude access to the data simply because it is retained by an outside entity. Further, I.C. 5-14-3-3(g), precludes the Board from entering into a contract with a vendor that requires the public to obtain a license or pay copyright royalties for obtaining the right to inspect and copy the records unless otherwise provided by applicable statute.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine

duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The Board is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Board’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, you allege that you submitted a hand-delivered written request to the Board on January 17, 2012 to which the Board did not respond to your request in any fashion. Accordingly, the Board violated the APRA when it failed to respond in any fashion to your hand-delivered written request within twenty-four hours of its receipt.

At the outset I would note that the Board does not challenge or dispute the validity of the previous advisory opinion issued by the Public Access Counselor brought by DataLister. *See Opinion of the Public Access Counselor 99-FC-10*. In that opinion, the issue presented to Counselor O’Connor was whether expiration dates of contracts of worker’s compensation insurance that were maintained in the Board’s proof-of-coverage database should have been disclosed upon a request for public access to this information. *Id.* At that time, the Board responded to DataLister’s initial request and provided that the information was confidential, as a trade secret, pursuant to I.C. § 5-14-3-4(a)(4). Counselor O’Connor advised that it was her opinion that the expiration dates of workers compensation insurance contracts that were *maintained* as part of the Board’s proof-of-coverage database are not “trade secrets” under I.C. § 5-14-3-4(a)(4), and therefore, should have been disclosed upon request (emphasis added). The Board thereafter complied with Counselor O’Connor’s opinion and provided the information to DataLister.

In response to your formal complaint, the Board has provided that your request was denied because the Board no longer maintained any record responsive to your request. The Board does not believe, nor did it deny your request, due to the POC data that that was sought is confidential as a trade-secret pursuant to I.C. § 5-14-3-4(a)(4). The information that is sought that was previously provided to the Board by NCCI has not been submitted to the Board since October 2010. At the present time, the Board utilizes NCCI’s web portal, embedded in the Board’s website, as its exclusive means of determining the appropriate insurance carrier for a given claim. The tool is free of charge and provides the public the same level of access as employees and members of the Board.

Both parties cite to I.C. § 22-3-5-2 as to what POC data the Board is required to maintain under the law. The Board provides that the Indiana Code speaks to reporting notices of termination, renewal, and additions of worker's compensation policies. The law does not define the elements that are to be reported to the Board or the manner in which the Board will utilize the data. Further, the Board is able to prescribe the manner in which said notices are to be provided. At the current time, the Board has chosen to subscribe to the data feed currently being provided to the ICRB, by order of the DOI, and housed by NCCI. DataLister provides that employers have a legal responsibility to ensure their worker's compensation coverage is provided to the Board. If the Board does not have access to the POC data, then it is abdicating its statutory responsibilities. Counselor O'Connor held that the expiration dates of workers compensation insurance contracts that were *maintained* as part of the Board's proof-of-coverage database are not "trade secrets (emphasis added). The Board has provided that it no longer maintains said information, thus it cannot provide what it does not have. It is outside the purview of this office to opine whether the Board has properly interpreted I.C. § 22-3-5-2 *et seq* as to what specific information is required to be maintained by the Board. As such, this opinion will be limited to the responsibility of the Board as a public agency pursuant to the APRA.

A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. *See* I.C. §5-14-3-2. Generally, the APRA does not require public agencies to produce records that the agency does not physically maintain. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy....").

However, the Indiana Court of Appeals held in *Knightstown* that because a private entity created a settlement agreement *for* a public agency, the settlement agreement was a public record subject to disclosure under the APRA. *Knightstown*, 838 N.E.2d at 1134. The Court did not find that the language "created, received, retained, maintained or filed by or with a public agency" in I.C. §5-14-3-2 excepted from the definition records created *for* or *on behalf of* a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room in order to deny the public access. *Id.* at 1133. In other words, where records are created or maintained for a public agency but kept in the possession of an outside entity, the Court of Appeals ruled that the agency is obligated to retrieve the records and make them available for inspection and copying upon request. *See Opinion of the Public Access Counselor 10-FC-219*.

The Board has provided that it no longer maintains the POC data from NCCI that is sought; thus it does not violate the APRA by failing to provide a record that it does not maintain. However, it is not apparent whether NCCI still maintains the POC data, for or on behalf of the Board, as per *Knightstown*. The public access counselor is not a finder

of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* If NCCI continues to maintain the POC data that is sought by DataLister, for or on behalf of the Board, the Board would be required to provide the records in response to a properly submitted records request, absent any applicable exception. However, if NCCI does not maintain the POC data, for or on behalf of the Board, then the information that is sought would not be considered a public record of the Board and it would not be acting contrary to the APRA by denying your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the Board violated the APRA by failing to respond to your hand-delivered written request within twenty-four hours of its receipt. Further, if NCCI continues to maintain the POC data that is sought, for or on behalf of the Board, then the Board would be required to provide the data in response to a public records request. But, if NCCI does not maintain the POC data, for or on behalf of the Board, then the data would not be considered a public record and the Board would not be required to provide the records in response to a public records request.

Best regards,

A handwritten signature in black ink, appearing to read "Joe Hoage". The signature is stylized with a large initial "J" and "H".

Joseph B. Hoage
Public Access Counselor

cc: Linda Hamilton